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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

HELEN C. POFF, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOHN B. WELSHANS, DECEASED, PETITIONER,

vs.

THE PENNSYLVANIA RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 4, 1945.

CERTIORARI GRANTED NOVEMBER 13, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 26, 1945.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HELEN C. POFF, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, Plaintiff-Appellee,

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant

STATEMENT UNDER RULE 13

This action was commenced in the United States District Court for the Eastern District of New York by the filing of the complaint on December 21, 1943, and the service of the summons and complaint on defendant on December 22, 1943. An amended complaint was filed on January 27, 1944. Defendant's answer was filed on February 4, 1944. The complaint was further amended on the trial and the second cause of action therein alleged was withdrawn.

The case came on for trial before Hon. Clarence G. Galston, District Judge, and a jury, on November 14-15, 1944, and resulted in a verdict for the plaintiff in the sum of $8,500. The Court, on November 29, 1944, filed its opinion denying defendant's motions to set aside the verdict and dismiss the complaint or direct a verdict for defendant.

Judgment in the amount of $8,575.63 was entered on December 6, 1944.

Defendant filed its notice of appeal to the United States Circuit Court of Appeals for the Second Circuit on March 6, 1945.

Plaintiff's attorney is William J. Carey, 141 Broadway, New York City, Morris A. Wainger, of counsel.

[fol. 2] Defendant's attorneys are Burlingham, Veeder, Clark & Hupper, 27 William Street, New York City.

There has been no change of attorneys since the commencement of this action, nor has there been any change of parties, except that this suit was instituted by Helen C. Poff, as executrix of the Last Will and Testament of John B. Welshans, deceased, probated in Allegheny County, Pennsylvania, and prior to the trial, ancillary letters testamentary

upon the Estate of John B. Welshans were issued by the Surrogate's Court of the County of Kings, State of New York, to said Helen C. Poff, and she qualified as such ancillary executrix and the complaint was amended to state said fact.

[fol. 3] IN DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF NEW YORK

Civil Action No. 3555

Jury Trial Demanded by Plaintiff

HELEN C. POFF, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, Plaintiff,

against

THE PENNSYLVANIA RAILROAD COMPANY, Defendant

AMENDED COMPLAINT—Filed January 27, 1944

The plaintiff above named, by William J. Carey, her attorney, for her amended complaint, alleges:

For a First Cause of Action:

1. That this action is brought by plaintiff under the provisions of the Federal Employers' Liability Act and its amendments.

2. That at the time of the commencement of this action the defendant is doing business as an interstate carrier by railroad within the jurisdiction of this Court.

3. That at all the times hereinafter mentioned the defendant was and still is a corporation of the State of Pennsylvania and was and still is engaged in the business [fol. 4] of a common carrier by railroad and as such carrying on interstate commerce by railroad between the State of New York, Pennsylvania and other States.

4. That on the 10th day of September, 1943, one John B. Welshans was working for the defendant as a locomotive engineer.

5. That on said day he was engineer on a steam engine of defendant, designated as engine No. 6423, which engine,

at the time of the accident hereinafter mentioned was hauling a train of the defendant consisting of several freight cars, proceeding in an easterly direction on the main line of defendant, the said main line at the place of said accident, consisting of four tracks all maintained, owned and used by the defendant, and going through or near a locality known as Kittaning Point, near Altoona, Pennsylvania.

6. That at about 6:30 A. M. of said day, in the vicinity of said Kittaning Point, the engine of said train upon which said Welshans worked as an engineer, derailed and left its tracks together with several cars of said train, and said engine upset and went down an embankment next to the track upon which it was proceeding.

7. That in the derailment of said engine and cars said John B. Welshans sustained injuries which caused his death then and there.

8. That at the time of said accident three trains of the defendant were involved in the accident and a part of each derailed, each of which trains at the time were proceeding on different tracks.

[fol. 5] 9. That the said Welshans was killed as aforesaid without any negligence on his part.

10. That the derailment of the three trains above mentioned was not caused by any negligence on the part of the said Welshans.

11. That the derailments of said trains was due to the negligence of the defendant and its employees.

12. That the train upon which said Welshans was working at the time of said accident was interstate in character.

13. That at the time of said accident said Welshans was doing work for defendant which was likewise interstate in character.

14. That at the time of his death as aforesaid the said Welshans left no wife, no children or grandchildren and no parents but left surviving him two sisters and a nephew, the son of a deceased brother, none of whom was dependent upon deceased, and this plaintiff, his first cousin, who was entirely dependent upon him, and who by reason of his death as

aforesaid has lost his support and maintenance and has been damaged in the sum of Twenty-five thousand dollars.

15. That before the commencement of this action this plaintiff has been appointed the legal and personal representative of the deceased as Executrix of his Last Will, by the Register of Wills in and for the County of Allegheny, Pennsylvania, in which county the deceased resided at the time of his death, and she duly qualified as such and is now acting as such. That on or about June 28, 1944, ancillary letters testamentary upon the estate of said John B. [fol. 6] Welshans, Deceased, were duly issued by the Surrogate's Court of the County of Kings, State of New York, to Helen C. Poff, the plaintiff herein, and she has duly qualified as, and now is, Ancillary Executrix of the Estate of said John B. Welshans, Deceased, by virtue of said ancillary letters testamentary.

Wherefore, plaintiff demands judgment against the defendant for the sum of Twenty-five thousand dollars and costs.

William J. Carey, Attorney for Plaintiff, 141 Broadway, Borough of Manhattan, City of New York.

[fol. 7] In District Court of the United States

Answer—Filed February 4, 1944

For its answer to plaintiff's amended complaint defendant

First Defense to First Cause of Action:

1. Admits the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 12 and 13 of the complaint; denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 10 and 15 of the complaint and denies the allegations contained in paragraphs 9, 11 and 14 of the complaint except that it denies that it has any knowledge or information sufficient to form a belief as to relatives who survived the deceased.

First Defense to Second Cause of Action:

2. Answering the allegations of paragraphs 1 to 13 inclusive and 15 of the amended complaint as repleaded in paragraph 16 of the amended complaint, it repleads the al-

legations contained in paragraph 1 of this answer as though repleaded at length and denies the allegations contained in paragraph 17 of the amended complaint.

Second Defense to First and Second Cause of Action:

3. Alleges that the death of plaintiff's testator was caused solely by the negligence of said testator.

[fol. 8] Third Defense to First and Second causes of action:

4. Alleges that the death of plaintiff's testator was contributed to by the negligence of said testator.

Fourth Defense to First and Second Causes of Action:

5. Alleges that plaintiff is an executrix appointed by the Register of Wills of Allegheny County, Pennsylvania by reason of which she may not institute and maintain this action.

Wherefore, defendant demands judgment that the amended complaint herein be dismissed with costs.

Burlingham, Veeder, Clark & Hupper, by George H. Emerson, A member of the firm. Attorneys for Defendant, 27 William Street, New York City.

[fol. 9] In District Court of the United States

Agreed Statement of the Case—April 13, 1945

Pursuant to Rule 76, Federal Rules of Civil Procedure, the parties have agreed upon this Statement of the Case, which sets forth such facts averred and proved as are essential to a decision by the appellate court of the question herein involved, and which shall constitute the record on appeal.

The only point which appellant will urge on this appeal is that plaintiff, Helen C. Poff, is not "the next of kin dependent upon" the decedent John B. Welshans within the meaning of the Federal Employers' Liability Act, and that this suit is not maintainable for her sole benefit, inasmuch as Welshans left nearer relatives surviving him.

On September 10, 1943, John B. Welshans, a resident of Pennsylvania and an employee of the defendant, was killed in a railway accident in Pennsylvania while engaged in

interstate commerce within the meaning of the Federal Employers' Liability Act. It was conceded at the trial that the accident was due to negligence chargeable to the defendant.

Welshans left no widow, children or parents surviving him. His nearest surviving relatives were two sisters, Mrs. Harry Spitz and Miss Edna Welshans, and a nephew (a son of Welshans' deceased brother), none of whom was in any way dependent upon the deceased.

[fol. 10] Helen C. Poff, a resident of Pennsylvania, was a cousin of Welshans, being the daughter of Welshans' mother's brother. She was named as executrix under Welshans' last will and testament, which was duly probated in Allegheny County, Pennsylvania.

The evidence with respect to the dependency of said Helen C. Poff upon Welshans was correctly summarized by the Trial Court in his charge as follows:

> "• • • it appears that Welshans was living with his mother in his home in Pennsylvania up to the time of the mother's death in March of 1937, and then, following the mother's death, in January of 1938 Mrs. Poff and her husband at the decedent's request came to live at his house, and at first Mr. and Mrs. Poff contributed $75 a month to the upkeep of the house. Then the husband of Mrs. Poff died some two and a half months after they moved in. She had brought with her some of her furniture, and that was installed in the Welshans home. She also had a car. After the husband's death the $75 a month, which was her contribution and that of her husband prior to his death, ceased, and she received from Welshans $40 or $50 a month for her personal expenses, and in addition a monthly allowance for the upkeep of the house. By upkeep I do not mean to include taxes and repairs. They were covered by Welshans directly. There came a time when Welshans' brother died, and then the amount paid by Welshans was reduced from $175 a month to $120 or $130 a month for food and maintenance. The monthly allowance to her for her personal use was however continued in the sum of $40 or $50 a month.
>
> [fol. 11] The theory of the plaintiff is that on those facts you cannot conclude that she was a mere housekeeper, but that she was a dependent living there with no other source of income and receiving money for her

personal use, and money with which to buy food and maintain herself and Welshans up to the time of his death."

Under the Court's charge, the jury must have found that Helen C. Poff was dependent upon Welshans—appellant does not contest that finding on this appeal.

During the trial, at the end of the plaintiff's case and at the end of the entire case, defendant made the following motions:

Motion at end of plaintiff's case.

"Mr. Merritt: If it please the Court, I move to dismiss the complaint upon the grounds that the plaintiff has failed to prove the allegations of the complaint relative to the issues that have been presented, namely, the fact that she is a next of kin within the meaning of the law of the State of Pennsylvania.

The Court: I will reserve decision on the motion."

Motion at end of entire case.

"Mr. Merritt: If the Court please, the defendant renews the motions made at the end of the plaintiff's case, and also moves for a directed verdict on the same grounds.

The Court: I will reserve decision on those motions."

The trial court reserved decision on this question of law, submitted the case to the jury, and when, following rendition of the verdict, the same point was urged by defend- [fol. 12] ant's motion to set aside the verdict and to dismiss the complaint or direct a verdict for defendant, the Court took the motions under advisement. Subsequently, the Court denied defendant's motions.

Attached hereto, and made a part of this statement, are a copy of the judgment appealed from and a copy of the notice of appeal with its filing date; also a copy of the Court's opinion on the denial of defendant's motions.

Dated, April 13, 1945.

Burlingham, Veeder, Clark & Hupper, Attorneys for Defendant-Appellant. William J. Carey, Attorney for Plaintiff-Appellee.

Approved.

Dated: April 13, 1945.

Robert A. Inch, U. S. D. J.

[fol.13] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

OPINION—Filed November 29, 1944

GALSTON, D. J.:

The matter for decision is a motion made by the defendant to set aside the verdict rendered by the jury for the plaintiff in the sum of $8,500. on the ground that Helen C. Poff is not authorized to maintain an action for her own benefit in circumstances which show that there are nearer surviving relatives of the deceased.

The action is under the Federal Employers Liability Act, Title 45, U. S. C., Secs. 51-60. The decedent died as a result of injuries which he sustained in defendant's employ as a railroad engineer. At the trial, defendants admitted liability for the collision and derailment which caused the death of the decedent. The decedent was unmarried. The only relatives surviving him, other than the plaintiff, were two sisters and a nephew, the latter a son of a deceased brother. Neither the sisters nor the nephew was dependent upon the decedent. Evidence at the trial disclosed that the plaintiff was a first cousin of the decedent and was dependent upon him for support; that he was supporting her at the time of his death and had supported her for about five and a half years immediately prior to his death. The plaintiff, a widow, took care of the decedent's household, which at the time of his death consisted only of the decedent and herself. He gave her $40. to $50. a month for her own use, for clothing, medical expenses and other incidentals, and [fol. 14] paid all household bills for food for both of them in the sum of about $120. a month. He also paid the taxes, repairs of the house which he owned, and other incidentals.

The relevant portion of Title 45, U. S. C., Sec. 51, provides that when an injury is sustained by a railroad employee through the negligence of the employer while engaged in interstate commerce, resulting in his death, the carrier shall be liable

> "to his or her personal representatives, for the benefit of the surviving widow, her husband, and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee • ".

The jury, under the charge of the court, by its verdict, must have concluded that Helen Poff was the next of kin dependent upon the deceased.

It is the position of the defendant that the plaintiff was not such next of kin as is contemplated by the statute.

As a matter of first impression and original interpretation of the statute in question, so far as it relates to this matter, a reasonable interpretation would seem to warrant the conclusion that the statute in terms intended as beneficiaries persons other than the widow, husband, children and parents if none there were, so as to create a beneficial interest in such of the next of kin as survive, providing such surviving next of kin are dependent upon the employee. It cannot be gainsaid that a cousin falls within the class "kin," —a blood relative. Certainly it may be conceded that a brother, sister, nephew and niece would be closer of kin than a cousin, but if such surviving next of kin were not dependent upon the decedent, then they could not fall under [fol.15] the statute, within the class to be benefited, and the next class should take.

Defendant cites *Seaboard Air Line* v. *Kenney, Administrator*, 240 U. S. 489, but that case is not helpful, for the question there presented was whether an illegitimate child is kin or next of kin of his parents, or of the legitimate children of his parents. Here there is no question that a cousin is not kin. Nor do defendant's citations of *Lindgren* v. *United States*, 281 U. S. 38; or *Bailey* v. *Baltimore Mail S. S. Co.*, 43 Fed. Supp. 243; *New Orleans & N. E. R. Co.* v. *Harris*, 247 U. S. 367; *C. B. & Q. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161; or *Moffett* v. *Baltimore & Ohio*, 220 Fed. 39, sustain defendant's proposition.

If any aid is to be obtained from precedents, *Gulf, Colorado & Santa Fe RR. Co.* v. *Mary J. McGinnis, Administratrix*, 228 U. S. 173 is closest. The action was brought by an administratrix in a State Court of Texas under the Federal Employers Liability Act to recover damages for the negligent death of the decedent while in the employ of the railroad company. The decedent left a widow and four children and the suit was brought for their benefit. Of the surviving children, one was a married woman, residing with and maintained by her husband. There was neither allegation nor evidence that she was in any way dependent

upon the decedent. The jury returned a verdict and apportioned it one-half to the widow and the remainder equally among the four children, including the married and non-dependent daughter. The Supreme Court criticized the State Court in holding that the federal statute authorized the suit to be brought for the surviving wife and children, [fol. 16] "irrespective of whether they were dependent upon him or had the right to expect any pecuniary assistance from him." Justice Lurton's opinion continues:

> "In a series of cases lately decided by this court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must therefore be limited to compensating those relatives for whose benefit the administrator sues as are shown to have sustained some pecuniary loss. *Michigan C. R. Co.* v. *Vreeland,* 227 U. S. 59, ante 417, 33 Sup. Ct. Rep. 192; *American R. Co.* v. *Didricksen,* 227 U. S. 145, ante, 456, 33 Sup. Ct. Rep. 224."

In the case at bar the plaintiff was shown to have sustained a pecuniary loss. Since, therefore, there is no authority for holding that the next of kin dependent upon such employee is to be excluded because there is a nearer non-dependent relative surviving, the motion to set aside the verdict of the jury is denied.

Clarence G. Galston, U. S. D. J.

[fol. 17] In United States District Court, Eastern District of New York

Judgment—Entered December 6, 1944

The above entitled action having been regularly called for trial before Honorable Clarence G. Galston, District Judge, and a jury at a term of this Court on November 14 and 15, 1944 and the parties having appeared by counsel and the issues herein having been duly tried and heard upon

the testimony and proofs submitted on behalf of the respective parties and the jury having rendered a verdict in favor of the plaintiff and against the defendant in the sum of $8,500; and the defendant having moved the Court to set aside said verdict and for a directed verdict in favor of the defendant or in the alternative for a new trial; and the Court after due deliberation having rendered and filed its opinion on November 29, 1944, denying defendant's said motions; and the costs and disbursements of plaintiff having been taxed upon notice in the sum of $47.30; now it is by the Court

Adjudged and Decreed that the plaintiff, Helen C. Poff, as executrix of the Last Will and Testament of John B. Welshans, deceased, recover of and from the defendant, The Pennsylvania Railroad Company, having an office at 380 Seventh Avenue in the Borough of Manhattan, City of New York, the sum of $8,500, the amount of the verdict as rendered by the jury together with the sum of $28.33, interest thereon from November 15, 1944, together with the [fol. 18] further sum of $47.30, her costs and disbursements as taxed by the Clerk, amounting in all to $8,575.63, and that said plaintiff have execution against said defendant therefor.

Dated: Brooklyn, N. Y., December 6, 1944.
Percy G. B. Gilkes, Clerk, by Sidney R. Feuer, Deputy Clerk.

(Filing date—December 6, 1944.)

[fol. 19] In United States District Court, Eastern District of New York

Notice of Appeal—March 5, 1945

Sir:

Please Take Notice that the defendant, The Pennsylvania Railroad Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the judgment in the sum of $8,575.63 in favor of the plaintiff and against the defendant, entered herein in the office of the

Clerk of this Court on December 6, 1944, and from each and every part of said judgment, as well as from the whole thereof.

Dated, New York, N. Y., March 5, 1945.

Yours, etc., Burlingham, Veeder, Clark & Hupper, Attorneys for Defendant, Office and Post Office Address, 27 William Street, Borough of Manhattan, City of New York.

To: William J. Carey, Esq., Attorney for Plaintiff, 141 Broadway, New York City.

[Filing date—March 6, 1945.]

[fol. 20] In United States District Court

[Title omitted]

Stipulation as to Contents of Record—April 13, 1945

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties to the above entitled action that the record on appeal herein shall consist of the following:

Statement Under Rule 13
Amended complaint
Answer
Agreed statement of the case
Opinion of Galston, *D. J.*
Judgment
Notice on appeal
[fol. 21] Stipulation as to the record and Clerk's certificate

Dated, New York, N. Y., April 13, 1945.

Burlingham, Veeder, Clark & Hupper, Attorneys for Defendant-Appellant; William J. Carey, Attorney for Plaintiff-Appellee.

[fol. 22] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CORRECTNESS OF RECORD—April 13, 1945

It Is Hereby Stipulated and Agreed that the foregoing is the record as agreed upon by the parties by their respective attorneys.

Dated, New York, N. Y., April 13, 1945.

Burlingham, Veeder, Clark & Hupper, Attorneys for Defendant-Appellant; William J. Carey, Attorney for Plaintiff-Appellee.

[fol. 23] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 24] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, OCTOBER TERM, 1944

No. 351

(Argued June 5, 1945. Decided July 9, 1945)

HELEN C. POFF, as Executrix, Appellee,

v.

PENNSYLVANIA RAILROAD, Appellant.

Before L. Hand, Augustus N. Hand and Frank Circuit Judges

Appeal by the defendant from a judgment for the plaintiff in an action brought under the Federal Employers Liability Act, for the death of the plaintiff's testator through the defendant's negligence.

Ray Rood Allen, for the Appellant. Morris A. Wainger, for the appellee.

PER CURIAM:

The defendant appeals from a judgment in favor of the plaintiff in an action brought under the Federal Employers [fol. 25] Liability Act. The plaintiff's testator, a railroad engineer, was killed while engaged in interstate commerce, and the defendant conceded upon the trial that the accident was due to negligence chargeable to it. The deceased left no widow, children, or parents surviving; his nearest surviving relatives were two sisters and a nephew, none of whom was in any way dependent upon him financially. The following are the other relevant facts which the jury may be assumed to have found. The deceased was domiciled in Pennsylvania, as was the plaintiff, who was his cousin: a daughter of his mother's brother. He had lived with his mother until her death in January, 1937, when the plaintiff and her husband, at his request, came to live with him. At first she and her husband paid $75 a month towards the upkeep of the house; but the husband died shortly after they came to live with him; and thereafter she paid nothing, but received from him $40 to $50 a month for her personal expenses, and a monthly allowance for the upkeep of the house. When the decedent's brother died, the amount which he paid for the food and maintenance of the house was somewhat reduced, but he

continued to allow her the same amount for her personal use. She had no other income or money with which to buy food or to maintain herself.

The only point presented on this appeal is whether in the circumstances just stated, plaintiff had any standing to sue under §51, Title 45, U. S. Code, as "next of kin dependent upon such employee." We quote in the margin the relevant words of that section.* The plaintiff argues, and [fol. 26] the judge agreed, that the phrase, "next of kin dependent upon such employee," means the nearest kin who were dependent upon the deceased, and that, in ascertaining who are such, all nearer kin must be disregarded who were not dependent upon him. The defendant argues that the phrase means "next of kin" in the sense of the local statute of distributions, but that of these, those only can recover who suffer some loss by the death and only to the extent of their loss. In the absence of any widow, children or parents, the plaintiff's rule results in going down the line of inheritance as fixed by the statute of distributions, until one comes to the first "dependent," no matter how remote he may be, and how many it has been necessary to pass in order to reach him. (Presumably, if there are more than one of equal degree all will recover to the exclusion of those of remoter degree.)

The plaintiff relies chiefly upon the well-settled law that recovery by any of the persons named in the statute is limited to the pecuniary loss suffered. *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59; *Gulf, Colorado and Santa Fe R. Co.* v. *McGinnis*, 228 U. S. 173. However, the converse by no means follows: i.e. that all who suffer pecuniary loss by the death may recover. So much is certainly not true. No doubt, there would have been an intelligible purpose in so providing but from Lord Campbell's Act forward that has never been the law. The plaintiff cannot, and does not, invoke such a purpose, and must be, and is, content with a

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* "Every common carrier by railroad * * * shall be liable for damages to any person suffering injury while he is engaged by such carrier in" (interstate) "commerce, or in the case of the death of such employee to his * * * personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee."

less comprehensive one. She says, following *Notti* v. *Great Northern Railway*, 110 Mont. 464, that the words should be read as follows: "for the benefit of the surviving widow or husband and children of such employee (sustaining pecuniary loss because of his death) and, if none, then to such employee's parents (if they have sustained pecuniary loss because of his death) and if none, then to the next of kin [fol. 27] dependent upon such employee." The statute sets up a hierarchy of three classes: (1.) the widow and children; (2.) parents; (3.) next of kin. These are mutually exclusive: that is, when there is any recovery in a preferred class there can be none in any deferred class; but we can find no decision but *Notti* v. *Great Northern Railway*, *supra*, which holds that, when none of the members of a preferred class have suffered any loss, the members of the deferred class can take. It is possible that *New Orleans and Northeastern Railroad* v. *Harris*, 247 U. S. 367, 372, did not actually decide the opposite: it may there have been assumed that the widow could have recovered something, in spite of her long disappearance; indeed, that appears to have been decided in *Southern Railway* v. *Miller*, 267 Fed. Rep. 376, 381 (C. C. A. 4). Perhaps some such assumption was the basis of the decision in *Lytle* v. *Southern Railway*, 152 So. Car. 161; 171 So. Car. 221, where the court treated a women who had left the deceased and was living in open adultery, as not his widow. In spite of the fact that she could not in fact have suffered any loss, the court might have supposed that she could recover something, if still a wife. While, therefore, there may be no decision holding the opposite of *Notti* v. *Great Northern Railway*, *supra*, the proposition there laid down would be so arbitrary and capricious in application that it cannot be the law. There can be not the least question that the recovery of any amount, however small, by any member of a preferred class is a bar to recovery by all members of deferred classes. *St. Louis & San Francisco R. R.* v. *Seale*, 229 U. S. 156, 162; *Taylor* v. *Taylor*, 232 U. S. 363. For instance, in the case of a woman who abandons her home, even though she might recover something, it would be little, and yet it would oust a mother who was absolutely dependent on the deceased; and the same would also be true of a child, who, though inde- [fol. 28] pendently wealthy, got something, though little. Similarly of a father, to whom his son gave something, as against a sister who lived with him and depended upon his

support. It seems to us incredible that a statute, which certainly requires such exclusions, excepts cases where the members of the preferred class get nothing, instead of a pittance. On the contrary, we hold that it is the existence of members of preferred classes that bars members of deferred classes, and that the question whether they suffer any loss is irrelevant.

If this be true as between classes, it seems to us plain that an opposite principle should not be introduced in determining recovery among the next of kin themselves. As we have just seen, a widow or children who have suffered only a trifling loss, absolutely exclude parents, however needy; and parents who have suffered only a trifling loss, exclude grandchildren, brothers and sisters. Yet if the plaintiff is right, when there are neither widow, nor children, nor parents, a second or third cousin may recover, although there are intervening grandchildren, brothers, sisters, nephews, nieces, or other closer kin, provided these have suffered no loss by the deceased's death. Congress, which was willing to leave unremedied loss suffered by parents, or grandchildren, who might be totally dependent upon the deceased, could not have meant to recognize remote members of the deceased's other kin, similarly situated. The plaintiff's interpretation does not fulfill any rational purpose; it merely introduces an exception at the precise place where an exception is least to be desired or expected; it mutilates the statute, as much in its purpose as in its language. As in the case of the first two preferred classes, "next of kin" is defined by its hereditary, not by its pecuniary, relation to the deceased; it means the next of kin as the law has always meant it; and dependency is only a selective factor, a condition upon recovery by any members of [fol. 29] that class, as it is among members of the first two classes. The case is not therefore one in which Congress has failed to express its obvious purpose, and in which courts are free to supply the necessary omission; it is a case where—whatever that purpose—it certainly did not include what the plaintiff asserts.

Judgment reversed; complaint dismissed.

[fol. 30] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of July one thousand nine hundred and forty-five.

Present Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

HELEN C. POFF, as Executrix, etc., Plaintiff-Appellee,

v.

THE PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellant.

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and complaint dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 31] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Helen C. Poff, etc., v. The Pennsylvania Railroad Company. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed July 9, 1945. Alexander M. Bell, Clerk.

[fol. 32] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 29] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 13, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240, subdivision (a), of the Judicial Code, as amended, 28 U. S. C., § 347 (a). The judgment of the Circuit Court of Appeals, entitled Order for Mandate, sought to be reviewed, is dated July 9, 1945 (R. 28). This Decree reversed the judgment of the District Court and dismissed the complaint (R. 28).

Statute Involved

The statute involved is Section 1 of the Federal Employers' Liability Act (45 U. S. C., § 51), which, insofar as material here, provides as follows:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is engaged by such carrier in" (interstate) "commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, * * *."

Summary Statement of the Matter Involved

This is an action at law brought in the United States District Court for the Eastern District of New York by Helen C. Poff, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, the petitioner herein, against The Pennsylvania Railroad Company, the respondent herein, under the Federal Employers' Liability Act (45 U. S. C. §§ 51-60) to recover damages for the death of the deceased, a railroad engineer, who was killed while engaged in interstate commerce under circumstances which

respondent admitted on the trial constituted negligence chargeable to it (R. 9). The trial was before a jury which rendered a verdict for petitioner in the sum of $8,500, on which judgment for $8,575.63 was entered in the District Court (R. 17-18). An appeal from said judgment was taken by respondent to the United States Circuit Court of Appeals for the Second Circuit (R. 19), which reversed the judgment of the District Court and dismissed the complaint (R. 27, 28). The judgment of the Circuit Court of Appeals was entered herein on July 9, 1945 (R. 28).

Deceased left him surviving petitioner, his widowed first cousin, who was a member of his household and solely dependent upon him for support; she had received her entire support from him for five and one-half years before his death (R. 10-11). Two sisters and a nephew, a son of a deceased brother, who were in no way dependent upon him, also survived the deceased (R. 9). No widow, children nor parents survived him (R. 9).

The sole question involved on the appeal to the Circuit Court of Appeals was whether the petitioner is entitled to recover under the provision of Section 1 of the Federal Employers' Liability Act (45 U. S. C., § 51), that in case of the death of an employer the carrier shall be liable

> "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee * * *."

The District Court held that since the petitioner was the nearest dependent kin of the deceased, she was entitled to recover under the Act (R. 13-16). *Poff* v. *Penna. RR. Co.*, 57 Fed. Supp. 625.

The Circuit Court of Appeals decided that petitioner was not entitled to recover under this provision of the Act because nearer relatives survived the deceased, although they were in no way dependent upon him and although petitioner was the nearest surviving dependent relative (R. 24-27).

The Questions Presented

1. Whether the Circuit Court of Appeals properly interpreted Section 1 of the Federal Employers' Liability Act (45 U. S. C. § 51), in holding that petitioner, a first cousin of the deceased, his nearest relative dependent upon him for support, was not entitled to recover under the Act because two sisters and a nephew, the son of a deceased brother, who were nearer relatives than petitioner, also survived him, although they were in no way dependent upon the deceased nor suffered any pecuniary loss by his death.

2. Whether under Section 1 of the Federal Employers' Liability Act the phrase "next of kin dependent upon such employee" means the nearest *dependent* relative who survives a deceased employee, so that such a relative may recover under the Act when there are nearer relatives who were in no way dependent upon the deceased nor sustained any pecuniary loss by his death and who are thereby disqualified as beneficiaries under the Act.

3. Whether under Section 1 of the Federal Employers' Liability Act the phrase "next of kin dependent upon such employee" means that recovery is limited only to the nearest surviving relative, so that if such relative was in no way dependent upon the deceased and suffered no pecuniary loss by his death and is thereby disqualified as a beneficiary, no recovery can be had, and the cause of action lapses, although there is a relative, who was dependent upon the deceased and is his nearest *dependent* kin.

Specification of Errors

The Circuit Court of Appeals erred

1. In holding that petitioner, deceased's first cousin, who was wholly dependent upon him for support, and who was his nearest dependent kin, was not entitled to recover damages for his death under Section 1 of the Federal Employers' Liability Act (45 U. S. C., § 51) because he was also survived by two sisters and a nephew, the son of a deceased brother, who were in no way dependent upon him and suffered no pecuniary loss by his death and were thereby disqualified as beneficiaries under the Act.

2. In reversing the judgment of the District Court and dismissing the complaint.

Reasons Relied on for the Allowance of the Writ

The decision of the Circuit Court of Appeals for the Second Circuit, interpreting and applying Section 1 of the Federal Employers' Liability Act (45 U. S. C. § 51) and holding that the nearest dependent kin of a deceased employee may not recover damages for his death when nearer, but non-dependent, kin survive, raises an important question of federal law which has not been, but should be, settled by this Court.

(a) The question is important and should be settled by this Court because of the importance of the federal statute and of the provision thereof involved herein.

This Court has not decided the important question of federal law raised by the decision of the Circuit Court of Appeals: Whether, under the Federal Employers' Liability Act, on the death of a railroad employee, the survival of a nearer relative, who is disqualified as a beneficiary because he was in no way dependent upon the de-

ceased nor suffered pecuniary loss by reason of his death, deprives the relative next in degree of kinship, who is solely dependent upon the deceased and is the nearest dependent relative, of the right to recover, and thus leaves no enforceable cause of action.

The question involved is an important question of federal law. It deals with the interpretation of a section of the Federal Employers' Liability Act under which there is much litigation both in the federal courts and state courts.

There is also involved the question whether the Federal Employers' Liability Act is to be enforced in conformity with the principle applicable to death actions in which the right to recover is based upon dependency or pecuniary loss or other qualification: that upon disqualification of a possible beneficiary because he was not dependent or suffered no pecuniary loss or is otherwise disqualified, he is disregarded, and one less closely related, who is dependent and suffers pecuniary loss by reason of the death or is not subject to other disqualification, is entitled to recover. This principle was decisive in the following cases:

Notti v. *Great Northern Ry. Co.*, 110 Mont. 464; 104 Pac. 2d, 7. Action under Federal Employers' Liability Act.

Missouri, K. & T. Ry. Co. v. *Canada*, 130 Okla. 171; 265 Pac. 1045; 59 A. L. R. 743.

McFadden v. *May*, 325 Pa. 145; 189 Atl. 483.

Indianapolis & Cir. Traction Co. v. *Thompson*, 81 Ind. App. 498; 134 N. E., 514.

Pries v. *Ashland Light &c. Co.*, 143 Wis. 606; 128 N. W. 281.

Lytle v. *Southern Ry. Co.*, 152 So. Car. 161; 171 So. Car. 221. Certiorari Denied, 290 U. S. 645. Action under the Federal Employers' Liability Act.

Roberts, Federal Liabilities of Carriers, 2d Ed. vol. 2, § 882, pp. 1729-1731.

25 Corpus Juris Secundum p. 1112.

The question of federal law presented here is as important as that which served as the basis for granting the writ of certiorari in *Chicago, B. & Q. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161 (Certiorari granted, 271 U. S. 657), which also involved an interpretation of Section 1 of the Act. In that case the question was whether the survival of the deceased's mother, who was dependent upon him but who died before an administrator was appointed, barred an action on behalf of the sister. The question here is as important as the question considered by this Court in *Gulf, Colo. & S. F. R. Co.* v. *McGinnis*, 228 U. S. 173, although in that case the question was before this Court on writ of error before enactment of the limitation upon writs of error to this Court. In that case this Court decided that a child of a deceased railroad employee could not recover under the Federal Employers' Liability Act when there was "neither allegation nor evidence" that she was "in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of the continuance of his life".

The trial court held that, inasmuch as this Court had decided that only a dependent relative, or one who has suffered pecuniary loss by the death of the deceased, may recover under the Act (citing *Gulf, Colo. & S. F. R. Co.* v. *McGinnis*, 228 U. S. 173), the survival of a nearer non-dependent relative, who could not qualify as a beneficiary, should be disregarded and the nearest dependent relative permitted to recover.

Petitioner contended before the Circuit Court of Appeals that it was the intent of Congress in enacting the Federal Employers' Liability Act to provide for the nearest dependent kin of a deceased railroad employee; that, as this Court has held even in the case of a widow, children or parents, dependency or reasonable expectancy of pecuniary loss was a prerequisite to qualification as a beneficiary under the Act (*Gulf, Colo. & S. F. R. Co.* v. *McGinnis*, 228 U. S. 173; *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59); that in determining the right to recover, persons who